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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

CARROLL B. STOIANOFF,
Petitioner,

v.

COMMISSIONER OF MOTOR VEHICLES,
STATE OF NEW YORK

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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5818

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER COURT OF APPEALS SUMMARY ORDER AFFIRMING DISTRICT COURT'S ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISMISSAL OF NON-LAWYER *PRO SE* COMPLAINT ON PROCEDURAL GROUNDS WAS IN CONFLICT WITH ITS OWN PRIOR DECISIONS OR WITH THOSE OF THIS OR OTHER FEDERAL APPEALS COURTS?

2. WHETHER THE ORDER AFFIRMING SUMMARY DISMISSAL OF PRO SE COMPLAINT WHICH SPECIFICALLY ASSERTS PRIVACY AND PROCEDURAL DUE PROCESS PROTECTIONS UNDER FIRST, FOURTH AND FOURTEENTH AMENDMENTS HAS SO FAR DEPARTED FROM ACCEPTED JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH DEPARTURE, AS TO CALL FOR THIS COURT'S SUPERVISORY POWERS?

LIST OF PARTIES

Carroll B. Stoianoff, Plaintiff-Petitioner

Commissioner of Motor Vehicles of State of New York

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i.

LIST OF PARTIES ....ii.

TABLE OF CONTENTS .....iii.

TABLE OF AUTHORITIES ..... v.

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER WHICH CONFLICTS WITH RELEVANT AND SETTLED DECISIONS OF THIS COURT..... 8

II. THE XIVth AMENDMENT §1. PROVIDES NO EXCEPTIONS TO ITS PROTECTIONS..... 10

THIS CASE REPRESENTS AN ISSUE OF IMPORTANCE 13

CONCLUSION 15

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Federal Cases

Bell v. Burson, 402 U.S. 535,539, J. Brennan, 91 S.Ct. 975 (1990) 4, 8,9
Bush v. Gore, No. 00-949 7
Conley v. Gibson, 355 U.S.41, 45-46, 78 S.Ct. 99, 2 L.Ed. 2d, 80 (1957) 13
Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 . . . . . 4, 9
Goldberg v. Kelly, 397 U.S. 254 (1970) 4, 9
Hodel v. Virginia Surface Mining & Recl Assn., 452 U.S. 264, (1981) 8
Kelly v. Wyman, 294 F.Supp. 893-901 (S.D.N.Y.) 9
Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996) 2, 7
Lusane v. Hall's Security Analyst, Inc., No. 99-9421, January 4, 2001 7
McReynolds, Harford S.B.I. & Ins. Co. v. Harrison, 301 U.S. 495. 7
Niadach v. Family Finance Corp., 935 U.S. 337 (1969) 4,9
Ortiz v. Cornetta, 867 F.2d 146 13

State Cases

People v. Niesman, 356 Ill. 322 10

Federal Statutes

F.R.C.P. 12(b)(1)(2)(5) 4
F.R.C.P. 12(b)(6) 6
28 U.S.C. § 1254(1) 2
Freedom of Information Act, 5 U.S.C.S. § 552(b)(6) 3
Privacy Act, 5 U.S.C.S. 552(a); § 7., Pub. L. 93-579 (a)(1); § 2(b)(2) (1988), et seq. 2, 3
Social Security Act, 42 U.S.C. § 405 (c)(2)(C)(v). 2, 11

Tax Reform Act of 1976 4

State Statute

State Statutes New York Vehicle & Traffic Law, §502 6.(a) as amended in 1995 . . . . . 2, 4

Other

The Constitution of the United States 3, 4, 8, 10,12

Amendments I, IV, XIV. 3,4,12

Amendment XIV Due Process Clause 8,10,12

FOR WRIT OF CERTIORARI

Petitioner, Carroll B. Stoianoff, acting as and for himself, respectfully prays that a Writ of Certiorari issue to review the summary order of the United States Court of Appeals for the Second Circuit entered May 25, 2001, in the above entitled proceeding.

OPINIONS BELOW

Carroll B. Stoianoff, plaintiff, v. Commissioner of Motor Vehicles, 97 Civ 7226 (Hon. Colleen McMahon), judgment, memorandum and order, granting motion to finally dismiss, filed November 17, 1998, reprinted in the appendix. App. 1.

Carroll B. Stoianoff, plaintiff, v. Commissioner of Motor Vehicles, 99-7363, unpublished Summary Order affirming order in part, United States Court of Appeals for the Second Circuit, filed March 16, 2000, reprinted in the appendix. App. 00.

Carroll B. Stoianoff, plaintiff, v. Commissioner of Motor Vehicles, Memorandum Decision and Order granting defendant's motion to finally dismiss, 97 Civ. 7226 (Hon. Colleen McMahon), filed August 4, 2000, reprinted in the appendix App. 00.

Carroll B. Stoianoff, plaintiff, v. Commissioner of Motor Vehicles, 00-9090, unpublished Summary Order, United States Court of Appeals for the Second Circuit, affirming district court's second order, filed May 25, 2001, reprinted in the appendix. App.00.

JURISDICTIONAL STATEMENT

The latest judgment of the court of appeals was entered on May 25, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Privacy Act. 5 USCS 552(a); § 7, Pub. L. 93-579(a)(1); § 2(b)(2) (1988), et seq.

Social Security Act, 42 U.S.C. § 3405(c)(2)(C)(v) as amended October, 1976.

New York Vehicle & Traffic Law, § 502 6.(a) as amended in 1995.

STATEMENT OF THE CASE

On September 30, 1997, the petitioner who had been a New York licensed driver in good standing for 37 years brought suit against the respondent challenging a 1995 amendment requiring production of his Social Security number for renewal of his driver license. In a *pro se* complaint entitled to special leniency[1] he clearly asserted grounds that state's amendment of its *Vehicle & Traffic Law of 1995, § 502 6.(a)* and its federal authorities including *USCS Title 5 § 552a. 1988 amendments*, were constitutionally void and unenforceable, vague and ambiguous, overbroad, that they sought to deprive him of a constitutionally guaranteed due process protection of a substantial property interest, and that the state law was an arbitrary and capri-

[1] *See* Pltf's Memorandum in Opposition and Cross-Motion, dated July 11, 2000, pp. 2,5; and see *Lusane v. Hall's Security Analyst, inc.*, docket no. 99-9421, 2nd Cir., January 4, 2001.

cious, unlawful harassment of petitioner in that, *inter alia*, the state concededly already possessed petitioner's Social Security number in its computer data bank (Complaint, dated September, 1997, p. 3) ¶¶ 8.- 11.)

Petitioner's complaint, drafted by a non-lawyer, *pro se*, nevertheless clearly asserted causes of action (id. p. 5) grounded in First, Fourth and **Fourteenth Amendments**, alleging that defendant's VTL 502 as an arbitrary, unrelated basis for issuance of state driver license denies his First Amendment right to free speech and petition, abridges his Fourth Amendment right to be secure in his papers and effects, trespass his privileges and immunities and is an unlawful perversion of the intent of the purpose of the Social Security number. The complaint further set forth causes grounded in the Freedom of Information Act, *5 USCS § 552(b)(6)* exempting him from disclosure of personnel or medical files where disclosure constitutes a clearly unwarranted invasion of personal privacy; and a cause grounded in 5 USCS § 552(a) and its amendments regulating disclosure of Social Security numbers, *§ 7, Pub. L. 93-579 (a)(1); (2)(B)(b); § 2, Pub. L. 93-579 (1988) (b)*, wherein the congress stated the purpose of the amendment is to *(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent:*

> *§ 7(a)(1)* states: *It shall be unlawful for any federal, state, or local government agency to deny to any individual any right, benefit or privilege provided by law because of such individual's refusal to disclose his Social Security account number;* and, *(2) The provision of paragraph (1) of this subsection shall not apply with respect to (B) the disclosure of a Social Security number to any federal, state, or local agency maintaining a system of records in existence and operating before Jan-*

uary 1, 1975, if such disclosure was required under statue or regulation adopted prior to such date to verify the identity of an individual.

Petitioner's fourth cause of action (*id.* p. 6) while concededly inartfully drafted, alleged violation of his equal protections by the *Tax Reform Act of 1976* and *VTL 502 § 6.(a)*. His complaints and memoranda have repeatedly cited federal court decisions in asserting his right through *§ 1 of the Fourteenth Amendment* to due process protections from state acts which deprive him of a substantial property interest without a hearing: *Bell v. Burson 402 U.S. 535 (1971); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983; Niadach v. Family Finance Corp. 935 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970).* [2]

By his first motion dated October 20, 1997, respondent commissioner moved pursuant to FRCP Rules 12(b) (1), (2), and (5) for dismissal, on grounds of defective service and lack of subject matter jurisdiction. Petitioner served his memorandum in opposition and in support of cross-motion for summary judgment dated October 31, 1997, arguing and citing law that, inter alia, the district court had both personal and subject matter jurisdiction; that respondent's sovereign immunity claim failed against injunctive relief sued for unconstitutional acts; that VTL § 502 as amended in 1995 is discriminatory and regressive, and constitutionally invalid because it denies due process protections required by Fourth and Fourteenth Amendments.

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[2] See Second *Appeal Brief*, dated October 27, 2000, pp. 21 - 22; and see *Plaintiff's Surreply Memorandum of Law to Defendant's Reply Memorandum and Letter*, dated July 3, 2000, p. 4.

First District Court Order

By order judgment, memorandum and order dated November 17, 1998, the United States District Court for the Southern District of New York granted respondent's defective service and sovereign immunity defenses, further noting that the action was frivolous on its face, rejecting its privacy claims as *misplaced*. *See* App. 3.

First Appeal

Petitioner filed his notice of entry and notice of appeal in district court November 23, 1998. The Westchester clerk either willfully or inadvertently mishandled the notice of appeal resulting in considerable procedural delays between district and appeals courts, eventually resolved by Scheduling Order #2 issued October 19, 1999. Petitioner's first appeal to the United States Court of Appeals for the Second Circuit was served November 15, 1999 and argued March 16, 2000. The district court's order was partly affirmed on the sole ground that it lacked personal jurisdiction because of questionable service, although the unpublished order stated that service may have been perfected under federal law. In argument, respondent's counsel conceded the district court's dismissal had been premature and that the petitioner was free to re-serve an amended summons and complaint.

First Court of Appeals Opinion

In the order, the appeals panel disagreed that the court lacked subject matter jurisdiction, holding *that to the extent that complaint sought an injunction on the grounds that the Commissioner's action violated both the Constitution and various federal statutes, the suit is within the doctrine of Young and the district court had subject matter jurisdiction. . .*

> *. . .Lastly, while we express no view on the ultimate merits of this case, we disagree with the district court's sua sponte characterization of the suit as "frivolous on its face". . .While we do not purport to prejudge the issue of whether New York's law. . . violated the Privacy Act of 1974, we do note that claims by no means "frivolous on its face". See* App. 9 ¶ 2

Petitioner thereafter amended and re-served his First Amended Complaint dated March 27, 2000. Respondent again moved for dismissal, this time pursuant to 12(b)(6), on the ground that *plaintiff has failed to state a claim upon which relief can be granted.* (Despite respondent's motion under subparagraph [6], the district court insisted that its dismissal of the second amended complaint remained based on the same jurisdictional defects upon which it had based its dismissal of the first. *Infra.*)

Second District Court Order

In its 14-page order entered August 4, 2000, the district court again granted the motion and summarily dismissed respondent's *pro se* complaint on jurisdictional grounds, writing that *because Mr. Stoianoff has failed to state any viable federal claims . . . . I dismiss the First Amended Complaint in its entirety.* Concluding, in part: *This Court continues to adhere to its originally-expressed views about Mr. Stoianoff's complaint — all of it. See* App. 33..

Second Appeal

By notice dated August 12, 2000, petitioner filed his

notice of entry and notice of appeal from the district court's second order entered August 4, 2000.

Petitioner's brief refuted respondent's statutory and mainly distinguishable case law, emphasizing to the appeals panel that the district court conceded in its second order that it *adhered to* the same issues of federal statutory law which the panel's order required it to resolve. His brief requested reversal of the order appealed from, or in the alternative, for certification of Constitutional questions to this Court, and for such other, further and different relief as the panel deemed just and proper.

Oral arguments on the appeal were heard May 16, 2001. Petitioner argued that *Bush v. Gore 00-949* entered December 12, 2000, post-dating his appellant's brief, had broadened the constitutional view of the equal protection clause and further strengthened his Fourteenth Amendment claims.

Furthermore, his oral argument cited for his appeal the Second Circuit's own decision in *Lusane v. Hall's Security Analyst, Inc., 99-9421,* entered January 4, 2001, citing its earlier decision *in Lucas v. Miles, 84F3d 532, 535 (2d Cir. 1996)* reaffirming the settled doctrine that ***pro se plaintiffs should be granted special leniency regarding procedural matters,*** and that *dismissal with prejudice under Rule 4(b) for plaintiff's silent, unobtrusive failure to prosecute following noncompliance with the district court's order to file reply to defendant's summary judgment motion was too harsh a remedy to impose upon* ***pro se*** *plaintiff.*

Second Court of Appeals Decision

By unpublished summary order entered May 25, 2001, the United States Court of Appeals for the Second Circuit

affirmed the district court's second order dismissing petitioner's second verified complaint with prejudice. The order stated: *We find no error and therefore affirm for substantially the reasons stated by the district court.* App. 35, ¶ 1.

By notice of entry and notice of appeal served upon respondent June 20, 2001, petitioner gave notice of his intention to petition in this Court for Writ of Certiorari

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REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER WHICH CONFLICT IS WITH RELEVANT AND SETTLED DECISIONS OF THIS COURT.

The Court of Appeals for the Second Circuit has decided an important federal question, i.e. whether or not under federal and derivative state legislation the respondent state commissioner has the authority to deprive an unindicted constituent of an *important property interest*, i.e. renewal of a legally held, fee-paid driver license, without a hearing and without procedural due process of law. The district court concedes that this Court has held that petitioner's driver license is a property interest protected by the Fourteenth Amendment's procedural due process clause. See *Bell v. Burson, 402 U.S. 535 ,539 J Brennan 91 S. Ct. 975 (1990); and Hodel v. Virginia Surface Mining & Recl Assn. 452 U.S. 264 (1981)* where it was held that due process *ordinarily* requires some kind of hearing in the absence of *an emergency situation.*[3]

The respondent state commissioner at no time has stated an emergency existed which would under this Court's prior decisions, justify deprivation of petitioner's property interest without a hearing. He concedes that the Court's decisions in *Bell v. Burson , supra*, and others cited, have settled the issue that petitioner's license is an important property interest which deprivation requires due process of law, but argues federal and derivative state laws as

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[3] Plantiff's Memorandum in Opposition and Notice of Cross-Motion, dated July 11, 2000. p.11.

passed by the congress and state legislature circumvent petitioner's constitutional protections embodied in the Fourteenth Amendment and provide petitioner all the due process to which he is entitled. *Memorandum Decision and Order* entered August 4, 2000. *See* App. 12.

In Bell, *supra* the Court wrote that, as here:

> *The state argues that the licensee's interest in avoiding suspension of his licenses is outweighed by countervailing governmental interests and therefore that the procedural due process need not be afforded him. We disagree. . . Nor is additional expense occasioned by expanded hearing sufficient to withstand the constitutional requirement. "While the problem of additional expense must be kept in mind, [U.S. 535, 541] it does not justify denying a hearing meeting the ordinary standards of due process." Goldberg v. Kelly, 397 U.S. at 261, quoting Kelly v. Wyman, 294 F. Supp. 8930901 (S.D.N.Y.).*

In *Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983,* the Court held, in pertinent part: *A drivers license is an important interest, entitled to the protection of procedural due process of law.* Furthermore, in *Bell v. Burson, supra,* the court wrote:

> *Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicate important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.* Niadach v. Family Finance Corp. *935 U.S. 337 (1969);* Goldberg v. Kelly, *397 U.S. 254 (1970) This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a right or a privilege. . . We hold only that the failure of the*

present Georgia scheme to afford the petitioner a prior hearing on liability of the nature we have defined denied him procedural due process in violation of the Fourteenth Amendment.

II

THE XIVth AMENDMENT'S § 1. PROVIDES FOR NO EXCEPTIONS TO ITS PROTECTIONS.

Amendment XIV, Section 1., states as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner's complaint was dismissed, in part, on the ground that his Fourth and Fourteenth Amendment claims failed because the state's amendment of VTL 502 requiring production of federal Social Security number for renewal of driver's license was all the process that was due.

In People v. Niesman, 356 Ill. 322, the court defined *due process*:

The guaranty of due process of law requires that every man shall have the protection of his day in court and the benefit of the general law — a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection

of the general rules which govern society. . .An orderly proceeding in which a person is served with notice, actual or constructive, and has an opportunity to be heard and to protect and enforce his rights before a court having power to hear and determine the cause, is due process of law.

Among the 14 pages of largely distinguishable and inapposite case law cited by the district court in granting respondent's dismissal motion, is respondent's citation of a district court decision that due process does not require a formal hearing, concededly grounded on this Court's decision in *Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293 (1995) (Breyer, J., dissenting)* in which it was held that *Due Process Clause does not entitle an individual to* ***additional*** *hearing unless there is factual dispute that* ***additional*** *procedure might help resolve [Emphasis added].*

Here, as petitioner's *pro se* complaint and memoranda make clear, there is no *additional* hearing because there is no *initial* hearing—and there are factual disputes aplenty: *Inter alia,* has plaintiff been tried and found guilty of any traffic or family law crime or other offense?; Is he an absent parent of dependent children?; has he failed to make payments as ordered?; has defendant shown that plaintiff is in any degree unfit to operate a motor vehicle?

Then there is the larger question of whether his constitutional rights, clearly and unambiguously set forth in the Bill of Rights and asserted in his Complaint, can be revoked, re-interpreted or circumvented by congressional act or judicial review without constitutional amendment? Among many others, there are issues here as to whether congress in fact ever had the power to amend the Social Security Act with respect to unrelated private and public uses of Social Security numbers which questionable authority appears to rely solely on presidential emergency war

powers in 1943.

Petitioner's papers question whether respondent's defenses as interpreted by the district court are rational in other respects: i.e., (1) Is the state's interest in safe and orderly public streets and highways rationally related to its interest in enforcing domestic court orders? (2) Is it rational to put at risk the personal security and privacy of millions of its drivers to embark on a fishing trip to identify a relatively small number of individuals *"with economic means"*[4] evading judgment? (3) Is it rational for the modern state, which has all the cutting-edge electronic surveillance, communications, and data processing technology provided at taxpayer expense to further encroach on petitioner's rights and privileges, imposing unreasonable conditions on their exercise in compelling production of Social Security numbers it already has, or can easily acquire, through electronic data processing?

THIS CASE REPRESENTS ISSUES OF IMPORTANCE

The urgent need for law reform of overbroad, ambiguous and conflicting laws governing use and abuse of petitioner's Social Security number is beyond question, as witness the decades of litigation, equivocation in the Congress, the endless privacy commissions, and the confusion here in the two Court of Appeals decisions. *See* App. 4, and App. 34.

On the First Amendment issue: Is petitioner's First, Fourth and Fourteenth Amendments right to petition for redress of grievances an empty one, or does it imply a right to be heard and in a proper case, to a remedy? Complaint, dated September 26, 1997, p. 4.

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[4] *See* App. 17 ". . . lack of adequate income from parents with economic means . . ."

On the Fourth and Fourteenth Amendment's issues of privacy and procedural due process: Can the state arbitrarily and unreasonably circumvent constitutional protections to demand petitioner's federal Social Security number which it concededly intends to share with "other jurisdictions"; jurisdiction over which it concedes it exercises no jurisdictional control. Where, in fact, the public record clearly shows that, contrary to the claims of the respondent, as many as 34 of the jurisdictions have failed to prevent the subsequent use of individual's numbers in felony crimes including murder of those very same individuals? Appellant's Brief, dated October 27, 2000, p. 14.

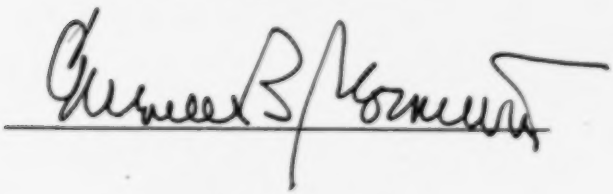
On the issue of fairness in adjudicating petitioner's *pro se* pleadings. In *Sotos v. Walker, 44 F.3d 169, 173 2d Cir. 1995,* the Court said: *"A pro se's submissions should be liberally construed to raise the strongest arguments they suggest", quoting Hughes v. Rowe, 1980, 101 S.Ct. 173, 449 U.S. 566, L.Ed. 2d 1263:* and *Haines v. Kerner, 1972, 92 S.Ct. 594, 404 U.S. 519, 30 L.Ed 2d 652.* Petitioner's petition respectfully submits that in dismissing the Complaint without opportunity for further amendment, the district court's order erred in denying requisite liberality by imposing the same or greater degree of strictness on *pro se* plaintiff's pleadings it would have imposed on those of more experienced counsel.

On this ground alone, the petition should be granted Certiorari.

CONCLUSION

For all the above reasons, petitioner respectfully requests the Petition for a Writ of Certiorari be granted.

Respectfully submitted,



Carroll B. Stoianoff
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App. 1

Carroll B. Stoianoff, plaintiff *pro se*
v.
Commissioner of Motor Vehicles

No. Civ. 97-7226.

United States District Court
Southern District of New York

Dated November 16, 1998
Entered November 17, 1998

Carroll B. Stoianoff, *pro se*, for plaintiff.

Eliot Spitzer, Attorney General, State of New York

McMahon, J. District Judge.

Plaintiff, Carroll B. Stoianoff, brings suit against the Commissioner of Motor Vehicles of the State of New York for declaratory and injunctive relief and unspecified damages. The gravaman (sic.) of his complaint is that the New York State Department of Motor Vehicles refused to renew Plaintiff's drivers' license because Plaintiff refused to give DMV his social security number, calling it "an unwarranted invasion of my privacy." (See letter dated August 27, 1997, Plaintiff's Ex. A to his Affidavit in Opposition and Cross-Motion) Defendant, by the Attorney General of New York, moves to dismiss the complaint for lack of personal jurisdiction over the Commissioner. More fundamentally, the State also moves to dismiss this action on Eleventh Amendment grounds, since it seems clear from the complaint that the Commissioner is being sued in his

official capacity, for his allegedly wrongful failure to perform an action required by his office.

Plaintiff opposes the motions and cross-moves for judgment.

Plaintiff's primary response to the Attorney General's motion is that, as he is appearing *pro se*, the usual rules concerning service and the like ought not to apply to him. That, of course, is not the law. It is quite clear that the Commissioner has not been properly served pursuant to CPLR 307, which governs service upon the State or State officer who is sued solely in his official capacity, as the Commissioner is in this case. Indeed, plaintiff does not really controvert the Attorney General's motion. While he is correct that Federal courts are to give *pro se* litigants some latitude, we are not permitted to dispense with the rule of law altogether. Even a *pro se* plaintiff like Mr. Stoianoff must effect service in the proper manner in order to commence a lawsuit.

However, even if Plaintiff had served the Commissioner in compliance with the CPLR, his complaint would have to be dismissed on sovereign immunity grounds. A reading of Plaintiff's complaint and his papers submitted on the motion reveals that, while the Commissioner is the only named defendant, he is not being sued in his individual capacity. Rather, as Plaintiff adamantly asserts, the lawsuit is being brought against, "the agency, the department, the State of New York, and the Commissioner, all being the same defendant and jurisdiction." Stoianoff Aff. ¶4. Rarely has there been such a clear statement of intent to bring an action against a State Official in his official capacity. As such, Plaintiff's suit is barred under the Eleventh Amendment to the United States Constitution. Papasen v. Allain, 478 U.S. 265, 276 (1986); Pennhurst State School and

Hospital v. Halderman, 465 U.S. 89, 1000-01 (1984); Cory v. White 457 U.S. 85,91 (1982); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Ex Parte State of New York, 256 U.S. 490 (1921).

The Court further notes that Plaintiff's action is frivolous on its face. The Federal Social Security Act expressly permits states to collect and use social security numbers for the purpose of administering drivers license laws, and the New York State Vehicle and Traffic Law, which requires the provision of such numbers, was amended in conformity with that Federal law. Since social security numbers collected by the DMV cannot be provided to the public, but may only be given to governmental entities in the administration of the drivers license program, Plaintiff's privacy concerns are misplaced.

The motion to dismiss the complaint is granted and the cross-motion for judgment is denied. This constitutes the decision and order of the Court.

Dated November 16, 1998
S/S Coleen McMahon, D.C.J.

App. 4

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 99-7363

Carroll B. Stoianoff, Plaintiff-Appellant v. Commissioner of Motor Vehicles, Defendant-Appellee	*	Appeal from the United States District Court for the Southern District of New York [UNPUBLISHED]

Dated: May 16, 2000
Entered: May 16, 2000

Before OAKES, LEVAL, and SACK, Circuit Court Judges

PER CURIAM.

Appeal from the United States Court for the Southern District of New York (Colleen McMahon. Judge).

Plaintiff appeals from the November 16, 1998 order of the district court dismissing his complaint. The complaint alleges that section 502 of the New York Vehicle and Traffic Law, which requires and applicant from a driver's license to disclose his social security number ("SSN"), violates the Constitution and several federal statutes. The district court

gave three alternative reasons or dismissing the complaint. First, the court held that it lacked personal jurisdiction over the defendant Commissioner because process had not been properly served. Second, the district court concluded that it also lacked subject matter jurisdiction because the Eleventh Amendment bars suits against the state in federal court. Third, the court sua sponte addressed the merits and found the action "frivolous on its face". We affirm solely on the ground that the court lacked personal jurisdiction.

We agree with the district court that process was not properly served on the defendant Commissioner and that the court therefore lacked personal jurisdiction over him. The Commissioner urges that Fed. R. Civ. P. 4(j)(2) governs service here. The Rule provides that service on "state, municipal corporation or other governmental organization . . . shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer" or by service "in the manner prescribed by the law of that state." Fed. R. Civ. P 4(j)(2). In New York, personal service on a state officer sued solely in an official capacity is made either (1) by personally serving the officer or (2) by mailing the officer a copy of the summons by certified mail and personally serving an assistant attorney-general at an office of the attorney-general or the attorney-general himself within the state. See N.Y. C.P.L.R. 307(2). Here it is undisputed that the commissioner- the chief executive officer of the Department of Motor Vehicles- was not served personally nor was he served by certified mail. While the summons and complaint was served personally on an assistant attorney-general at the Westchester office of the attorney-general, he was not designated to receive service on behalf of the Commissioner. In order for personal service to be effected

properly, it was also necessary to serve the Commissioner by certified mail.

It may be, however, that service here may be effected pursuant to Rule 4(e), which provides for service upon individuals generally. See, e.g. Echevarria-Gonzalez v. Gonzalez-Chapel, 849 F.2d 24, 28-30 (1st Cir. 1988) (Holding that service on state officer in his official capacity is sufficient if made pursuant to predecessor to Rule 4(e)). Rule 4(e) states that service may be effected either: (1) "pursuant to the law of the state;" (2) "by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion residing therein;" or (3) "by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." Fed R. Civ. P. 4(e).

We agree with the district court that the latitude afforded pro se litigants does not extend to dispensing with requirements. However, the defect is easily cured. The Commissioner conceded in oral argument, the plaintiff is free to re-serve the summons and complaint in compliance with N.Y.C.P.L.R. 307, which would satisfy the requirements under Rule 4(e) and Rule 4(j)(2), both of which permit service in accordance with the requirements of state law.

We disagree with the district court's additional assertion that the case should be dismissed because the court also lacked subject matter jurisdiction. The court concluded that because the suit was "an action against a State official in his official capacity" it was barred by the Eleventh Amendment. Although ordinarily suits against

the States in federal court are barred by the Eleventh Amendment, suits against state officers seeking to enjoin violations of federal law come within the exceptions of Ex-parte Young, 209 U.S. 123 (1908). This is so even when the allegation is against an officer acting in his official capacity and even when the remedy will enjoin the implementation of an official state policy or statute. See, e.g. Young, 209 U.S. at 159-160; Pennhurst State sch. & Hosp. V. Halderman, 465 U.S. 89, 1012-102 (1984) (recognizing that Young remains an "important exception" to general rule that "a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief"); Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) (state officers violating federal law may be sued, even in official capacity, for injunctive relief). Here, to the extent the complaint sought an injunction on the grounds that the Commissioner's action violated both the Constitution and various federal statutes, the suit is within the doctrine of Young and the district court had subject matter jurisdiction.

Lastly, while we express no view on the ultimate merits of this case, we disagree with the district court's sua sponte characterization of the suit as "frivolous on its face." In making this statement the district court may have been focusing on the complaint's allegations of unconstitutionality. But as to plaintiff's third cause of action, alleging a violation of The Privacy Act of 1974, we believe the complaint merits more careful consideration. See The Privacy Act of 1974. Pub. L. No. 93-579, 88 Stat. 1869 (partially codified at 5 U.S.C. § 552a and partially reprinted uncodified in annotations thereto) (the "Act").

Section 7(a)(1) of the Act gives ostensible support to

the plaintiff's contention. That section provides that "[it] shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit or privilege provided by law because of such individual's refusal to disclose his social security account number." 5 U.S.C.A. § 552a (reprinted in annotations). However, the applicability of section 7(a)(1) to a requirement to disclose the SSN in an application for a driver's license is called into question by a 1976 amendment to the Social Security Act, which provides: "It is the policy of the United States that any State . . . may, in the administration of any . . . driver's license, or motor vehicle registration law . . . utilize the social security . . . numbers . . . for [purpose of identification] and may require [disclosure of social security numbers for this purpose]." 42 U.S.C. § 405(c)(2)(C)(i) (added by The Tax Reform Act of 1976, Pub. L. No. 94-455. § 1211 (b) 90 Stat. 1520, 1711-12). On the other hand, an argument may be made that the policy declaration of the 1976 amendment does not exempt driver's license applications from the prohibitions of section 7(a) (1). Section 7(a)(2)(A) of the Act provides as an exception to the prohibitions of section 7(a) (1) "any disclosure which is required by Federal statute." Because the 1976 amendment relating to driver's license applications is merely a policy statement and not a requirement coming within the exception for a "disclosure which is required by Federal statute," it may be argued that the policy statement does not provide an effective exception to section 7(a) (1). On the other hand, to interpret the relationship between section 7(a)(2)(A) and the 1976 amendment in this fashion would have the effect of making the 1976 policy statement largely meaningless.

The Act provides a second exception from the general prohibition of section 7(a) (1) in the case of any "disclosure

[
that] was required under statute or regulation adopted prior to [January 1, 1975]." §7(a)(2)(B) (reprinted in annotations to 5 U.S.C.A. § 552a). New York Veh. & Traf. Law § 502—the state statute that Stoianoff alleges violates the Act—was amended only in 1995 to include the requirement that applications for licenses and for renewals include social security numbers. See 1995 N.Y. Laws. Ch. 81, §§ 209, 210 (amending § 502(1) (application) and § 502(6)(renewal) respectively). Thus, the New York regulation was not adopted before January 1, 1975 and therefore does not fall within the second exception to the general prohibition of section 7(a) (1) of the Act.

While we do not purport to prejudge the issue whether New York's law requiring plaintiff to furnish his SSN as a condition for the renewal of his driver's license violated the Privacy Act of 1974, we do note that the claim is by no means "frivolous on its face". Assuming that the plaintiff will properly serve the Commissioner, the district court will need to resolve this issue of federal statutory law.

We affirm dismissal for lack of personal jurisdiction. Plaintiff is free to correct the defect by serving process on the Commissioner. We also note, as the pro se plaintiff made inquiry at oral argument and the defendant acknowledged there was no impediment, that the plaintiff is free to amend his complaint.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

App. 10

Carroll B. Stoianoff, plaintiff *pro se*
v.
Commissioner of Motor Vehicles

No. Civ. 97-7226.

United States District Court
Southern District of New York

Dated and entered August 4, 2000

Carroll B. Stoianoff, *pro se*, for plaintiff.
Ellen M. Fitzgerald, Asst. Attorney General, State of New York

McMahon, J. District Judge.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

McMahon, J.:

Defendant, Richard P. Jackson, Commissioner of the New York State Department of Motor Vehicles ("Commissioner Jackson") moves ;pursuant to Fed. R. Civ. P. 12(b)(6) for an order dismissing plaintiff's First Amended Complaint (the "Complaint") in its entirety. For the reasons below, the motion is granted.

Plaintiff *pro se*, Carroll B. Stoianoff ("plaintiff" or "Stoianoff"), brings this action for declaratory and injunctive relief pursuant to 28 U.S.C. § 1331. The gravamen of plaintiff's complaint is that, by requiring him to supply his social security number("SSN") as a condition to renewing his driver's license, New York Vehicle and Traffic Law ("VTL").

§ 502(6)(a) violates the Privileges and Immunities Clause and the First, Fourth and Fourteenth Amendments to the United States Constitution, as well as the Freedom of Information Act, 5 U.S.C. § 552(b)(6)("FOIA"), the Privacy Act of 1974, 5 U.S.C. §552(a) and the Tax Reform Act of 1976, 42 U.S.C. § 405(c)(2)(C)(i). Plaintiff also asserts state law claims for "bar and waiver" and tortious conversion.

As discussed below, plaintiff's federal statutory and constitutional claims lack merit. First plaintiff's claims for alleged violation of FOIA and the Privacy Act of 1974 must be dismissed because neither statute provides for a private right of action against a state agency or official. However, even assuming, *arguendo*, that the Privacy Act of 1974 did permit actions against state agencies, plaintiff's claim fails because an amendment to the Social Security Act (codified as part of the Tax Reform Act of 1976) expressly authorizes States to require disclosure of SSNs in the administration of driver's license programs.

Second, plaintiff's constitutional claims are legally insufficient. The Complaint is devoid of any specific allegations of how Commissioner Jackson or VTL § 502 interfered with or infringed upon plaintiff's First Amendment right of free expression. Plaintiff is not contending that he was subject to an unreasonable search or seizure and he wherefore has not stated a claim for violation of the Fourth Amendment. The Privileges and Immunities Clause does not authorize individuals to bring actions against their own states; therefore r. Stoianoff, a New York resident challenging a New York statute, has no recourse against the Commissioner under that provision of the Constitution. Finally, the mandatory disclosure of an individual's SSN does not

threaten the sanctity of individual privacy so as to require constitutional protection. And Plaintiff's claim for alleged violation of ;procedural due process guaranteed by the Fourteenth Amendment should be dismissed because the legislative determination to amend VTL § 502 and require disclosure of SSNs as a condition to license renewal provided all the process that was due.

Last, because Mr. Stoianoff has failed to state any viable federal claim, this Court declines to exercise pendent jurisdiction over plaintiff's remaining state law claims for bar and waiver and tortious conversion. Instead, I dismiss the First Amended Complaint in its entirety.

PROCEDURAL HISTORY

On this motion to dismiss, the pertinent facts alleged in the Complaint relating to plaintiff's age, marital status, lack of dependent children and dealing with the New York State Department of Motor Vehicles ("DMV") are assumed to be true.

On or about September 26, 1997, plaintiff commenced this action for a judgment (1) declaring that VTL § 502(6)(a) was void and unenforceable and (2) enjoining the Commissioner from refusing to renew plaintiff's license in the absence of a SSN. On or about October 20, 1997, defendant moved to dismiss plaintiff's complaint for lack of personal and subject matter jurisdiction pursuant to Fed.R.Civ.P.12(b)(1),(2) and (5).

By Memorandum Decision and Order dated November 16, 1998, this Court granted defendant's motion to dis-

miss. The Court concluded that it lacked personal jurisdiction over the Commissioner because plaintiff had failed to effect proper service of process. In *dicta* the Court remarked that plaintiff's complaint was "frivolous on its face" because the Social Security Act expressly permitted states to collect and use social security numbers for the purpose of administering driver's license laws, and the New York Vehicle and Traffic Law had been amended to conform to the federal law.

Plaintiff appealed, and by summary order dated March 16, 2000, the United States Court of Appeals for the Second Circuit affirmed the district court's dismissal of plaintiff's complaint for lack of personal jurisdiction. The Court of Appeals held that the Commissioner had not been properly served, but indicated plaintiff was free to correct the jurisdictional defect by proper service of process on the Commissioner. Although the Court of Appeals acknowledged that plaintiff's allegations of unconstitutionality were frivolous, it chastised this Court for concluding that the complaint was "frivolous on its face" and directed that I determine certain issues of federal statutory law that the panel believed were present in the Complaint.

On or about April 14, 2000, plaintiff served Commissioner Jackson with a copy of the First Amended Complaint. The Commissioner immediately moved to dismiss the action.

FINDINGS OF LAW

I. Statutory Framework

A. *The Privacy Act of 1974*

Congress passed the Privacy Act of 1974 (the "Privacy Act") in response to increasing concern over the federal government's accumulation of personal information. See Pub.L. No. 93-579, 88 Stat. 1896, 5 U.S.C. § 552a. The Senate Committee Report indicates the Privacy Act was formulated to "safeguard individual privacy" and "promote governmental respect for the privacy of citizens by requiring departments and agencies of the federal government to observe certain rules and procedures relating to the collection, use and disclosure of an individual's personal information. See S. Rep. No. 1183, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News, 6916.

The Privacy Act references FOIA for the applicable definition of the various federal agencies to which it applies. See 5 U.S.C. § 552(f). If a federal agency requires disclosure of an individual's SSN the agency must inform the individual "whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it." 5 U.S.C. § 552a [reprinted in annotations].

A prohibition in the Privacy Act precluding federal, state or local government agencies from denying benefits or privileges to an individual based on that individual's refusal to disclose his social security account number appears in the historical annotations to the statute. See 5 U.S.C. 552a. This provision of the Privacy Act was never codified. Because of the "lack of ready independent data about the probable cost and effects of such a prohibition," the section was deleted in Committee. See S. Rep. No. 1183, 893rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News, 6943.

B. *The Social Security Act*

As part of the Tax Reform Act of 1976, Congress amended the Social Security Act as follows to permit state government agencies to require disclosure of SSNs:

> *It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Secretary for the purpose of establishing the identification of individuals affected by such law, and may require any individual who appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers if he has more than one such number) issued him by the Secretary.*

42 U.S.C. § 405(c)(2)(C)(i) (The Tax Reform of 1976 § 1211(b), Pub. L. 94-455, 90 Stat. 1520, 1711-12). The amendment authorized any State to "use social security numbers for the purpose of establishing the identification of individuals affected by any law or program in its jurisdiction." House Report No. 94-658, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Admin. News, 3820-21.

The 1976 amendment to the Social Security Act expressly addressed the terms of the Privacy Act. Any state department of motor vehicles that did not use the ASSN for identification in accordance with a statute adopted prior to January 1, 1975 (including, *inter alia*, New York) was expressly authorized to do so. See 42 U.S.C. § 405 (c)(2)(C)(vi). Also, Congress explicitly stated that, to the extent that any existing provisions of federal law was

inconsistent with the policy statement set forth in (i) of the amendment, such provision would become a nullity:

> *If and to the extent that any provision of Federal law heretofore enacted is inconsistent with the policy set forth in clause (i), such provision shall, on and after October 4, 1976,* ***be null, void and of no effect.***

42 U.S.C. § 405(c)(2)(C)(v). (Emphasis added). Thus, to the extent that there was any inconsistency between Section 7 of the Privacy Act and the 1976 amendment to the Social Security Act, Congress expressly chose to void Section 7 of the Privacy Act.

Unlike the proposed provision of the Privacy Act that would have prohibited the states from denying any benefits or privileges to persons who refused to disclose their SSNs, the 1976 Social Security Act amendment *was* codified. It has been law since 1976.

C. *New York Vehicle and Traffic Law § 502*

In 1995 the New York legislature amended the VTL to require that all individuals applying for or renewing a driver's license provide the DMV with their SSNs[1]. Through the administration of the driver's license program, the State obtains SSNs to identify individuals who have

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[1] VTL § 502(6)(a) provides, in pertinent part, as follows:

A license issued pursuant to subdivision five of this section shall be valid until the expiration date contained thereon, unless such license is suspended, revoked or cancelled. Such license may be renewed by submission of an application for renewal, the fee prescribed by law, proofs of prior licensing, fitness and acceptable vision prescribed by the commissioner, the applicant's

failed to make child or spousal support payments and, where necessary, to suspend that person's driver's license See VTL § 510(4-E). The amendment was enacted "to improve the economic well-being of children whose standard of living is eroded by lack of adequate income from absent parents with economic means" by authorizing the DMV to suspend a license when a party is in arrears on support payments. See N.Y. Laws, Ch. 81, §§ 209,210, Summary of Legislation 1995 (Senate)7-21.

New York State also participates in the National Driver Register pursuant to the National Driver Register Act of 1982. See Pub. L. No. 97-364, 96 Stat. 1747. Reports pertaining to individuals who have been denied a driver's license for cause, have had a license suspended or revoked for cause or have been convicted of certain motor vehicle-related offenses are submitted to the Secretary of Transportation as part of the National Driver Register. See 49 U.S.C. § 30304(a). Such reports contain, for identification purposes, the SSN required by the DMV. See 49 U.S.C. § 30304(b).

The license renewal form issued by Commissioner Jackson after the amendment of VTL § 502 states that the SSN will be used "only for exchange with other jurisdictions and to invoke invoke driver license sanctions for delinquent child/spouse support payments." (Cplt. ¶ 3.)

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social security number, and if required by the commissioner a photo image of the applicant in such numbers and form as the commissioner may prescribe . . .

D. *Limitations on DMV Disclosure of SSNs*

Federal and state law strictly limit the DMV's use of SSNs. The Social Security Act provides for the confidentiality and non-disclosure of SSNs and related records. See 42 U.S.C. § 405(c)(2)(C)(viii). DMV regulations provide that SSNs will not be made available to the public. See 15 N.Y.C.R.R. § 3.9(c).

Also, the Driver's Privacy Protection Act of 1994 ("DPPA") regulates the disclosure of personal information contained in DMV records by prohibiting the DMV from selling or re-distributing a driver's personal information to individuals or businesses without the driver's affirmative consent. See 18 U.S.C. §§ 2721-2725. The DPPA prohibits the DMV or any of is (sic) officers , employees or contractors from "knowingly disclosing or otherwise making available to any person or entity personal information about any individual obtained by the [DMV] in connection with a motor vehicle record." 18 U.S.C. § 2721(a).[2] The DPPA defines "personal information" as any information identifying an individual, including a SSN. See 18 U.S.C. § 2725(3).

II. Plaintiff Has Failed to State a Claim for Violation of the FOIA or Privacy Act.

Plaintiff's Second and Third Causes of Action allege that, by conditioning renewal of his driver's license

[2] Disclosure is permitted for use "by any government agency" or by "any private person or entity acting on behalf of a Federal, State or local agency in carrying out its functions." 18 U.S.C. § 2721(b)(1). The DPPA also allows States to divulge driver's personal information for any state-authorized purpose relating to the operation of a motor vehicle or public safety. See 18 U.S.C. § 2721(b)(14).

on disclosure of his SSN, VTL § 502 constitutes an "unwarranted invasion of personal privacy" in violation of FOIA and the Privacy Act. As addressed below, both claims are legally insufficient.

A. *There is No Private Right Of Action Against a State Agency Under FOIA Or The Privacy Act.*

Plaintiff has failed to state a claim under FOIA for two reasons. First, there is no private right of action to enjoin agency disclosures of information under FOIA. See Chrysler Corp. v. Brown 441 U.S. 281, 99 S. Ct. 1705 (1979). Second, FOIA applies only to "agencies" as that term is defined under 5 U.S.C. § 551(1). The statute provides, in pertinent part, that the term "agency" refers only to "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . ." See 5 U.S.C. § 551(1).

Thus, under FOIA, there is no private right of action against state agencies or officials. See Grand Central Partnership Inc. v. Cuomo, 166 F.3d 473, 484 (2d Cir. 1999) (adopting view of other Circuits and most districtr courts in Second Circuit that FOIA applies only to federal and not to state agencies); St. ichael's Convalescent Hosp. V. California 643 F.2d 1369, 1372-74 (9th Circ. 1981) (refusing to apply FOIA to state agencies receiving federal funding and regulation); Thomas v. Office of the United States Attorney Gen. 928 F.Supp. 245, 251 (E.D.N.Y. 1996) (FOIA directed only to conduct of federal agencies); Washington v. Police Dep't., 1994 U.S. Dist. LEXIS 11717 (S.D.N.Y.) refusing to apply FOIA to NYC Police Department); Rankel v. Town of Greenburgh 117 F.R.D. 50, 54 (S.D.N.Y. 1987) (refusing to apply FOIA to municipal corporations). The plain language of FOIA precludes its application to Commissioner Jackson. Plaintiff's claim under FOIA therefore fails.

The Privacy Act likewise does not apply to state agencies or officials because, as shown above, it incorporates the FOIA definition of "agency" as limited only to federal agencies. See 5 U.S.C. § 552a(g)(1) (providing that a private individual "may bring a civil action against the agency"); Dittman v. State of California, 1901 F3d 1020, 1026 (9th Circ. 1999) (civil remedy provision of Privacy Act does not apply to action against state agency); Unt v. Aerospace Corp., 765 F.2d 1440, 1447 (9th Circ. 1985) (same); St. Michael's Convalescent Hosp., 643 F.2d at 1372-74 (holding the Privacy Act provides no private right of action against "state agencies or bodies"; Pritzker v. City of Hudson, 26 F. Supp. 2d 433,441 (N.D.N.Y. 1998) (Privacy Act of 1974 provides certain privacy protections for records of individuals maintained by federal agencies and is inapplicable to state or local agencies); Mamarella v. County of Westchester, 898 F. Supp. 236, 237-8 (S.D.N.Y. 1995) (action under Privacy Act is limited to federal agencies).

It is true that proposed Section 7(a)(1) of the Privacy Act (cited by the Second Circuit in its summary order) — which would have made it "unlawful for any Federal, State or local government agency" to deny any person a right or benefit based on that individual's refusal to disclose his SSN —fairly implies the existence of a private right of action. However, that provision was never codified. It remains in the statute only as an historical "note." See 5 U.S.C.A. § 552a [reprinted in annotation]; see also supra discussion at Part I.A.

By limiting the scope of the Privacy Act's civil remedy provision, Congress plainly intended to foreclose private actions against any entity other than federal agencies. See 5 U.S.C. § 552a(g). For this Court to hold otherwise would circumvent Congressional intent that the rights secured by the Privacy Act be enforceable only against federal agencies. Accordingly, plaintiff's claims for violation of both

the Privacy Act and FOIA are dismissed.

B. *The Social Security Act Expressly Authorizes the DMV To Require Disclosure of Plaintiff's Social Security Number*

Even assuming, *arguendo*, that the private right of action under the Privacy Act did encompass actions against state agencies, it is the view of this Court that the Social Security Act was expressly amended to authorize the DMV to require disclosure of SSNs. See 42 U.S.C. § 405(c)(2)(C)(i). Congress also stated that any federal law that was in conflict with the amended Social Security Act would be null and void. See 42 U.S.C. § 405(c)(2)(C)(v). Because the uncodified Section 7(a)(1) of the Privacy Act conflicted with the policy statement contained in the 1976 amendment to the Social Security Act, it would have become "null and void and of no effect" as of October, 1976, pursuant to 42 U.S.C. § 405(c)(2)(C)(v). Thus, the amendment of VTL § 502 in 1995 to require disclosure of SSNs did not violate the Privacy Act.[3]

Mr. Stoianoff's contention that the Commissioner has failed to address the ambiguities in state and federal laws

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[3] Furthermore, the DMV's license renewal form would comply fully with the requirements of Privacy Act section 7(b) by indicating that plaintiff's disclosure of his SSN was mandatory (i.e., "You must supply your social security number . . ."); citing the statutory authority for the disclosure (i.e., VTL § 502); and identifying the limited purpose for which the SSN would be used (i.e., to invoke sanctions such as revocation of the driver's license, where necessary, in the collection of delinquent child/spouse support payments). See 5 U.S.C. § 552a [reprinted in annotations].

identified by the Court of Appeals in its summary order is erroneous. In the view of the panel, the alleged ambiguity between the Privacy Act — specifically Section 7(a)(1) of that Act —and the 1976 amendment to the Social Security Act arose because Congress did not *mandate* that the States to (sic) require individuals to disclose their SSNs when applying for a driver's license; instead, it merely *permitted* the States to do so. However, the summary order made no reference to the language in the 1976 amendment that nullified any provision of any federal law that was inconsistent with a State's right to mandate disclosure of SSNs as a condition of obtaining a driver's license. It may be that the Second Circuit was unaware that Section 7(a) (1) of the Privacy Act was dropped in Committee, or of the nullification language contained in 42 U.S.C. § 405(c)(2)(C)(v), when it prepared the summary order. In any event, the provision appears to have been dropped and the nullifying language does exist. In this Court's opinion, this clears up any latent or patent ambiguity.

III. Plaintiff's Constitutional Claims Are Dismissed

Plaintiff's First Cause of Action alleges, *inter alia*, that by requiring that he disclose his SSN, VTL § 502 violates the First, Fourth and Fourteenth Amendments to the United States Constitution and "trespass[es] his privileges and immunities as a citizen of the United States." In its summary order, the Second Circuit appeared to agree with this Court's assessment that plaintiff's constitutional claims were "frivolous on [their] face." On the following grounds, each of these claims must be dismissed for failure to state any legally-cognizable claim.

A. *Plaintiff Fails to State a First Amendment Claim because He Fails to Identify Any Conduct interfering with His Right of Free Expression.*

In order to state a claim for violation of First Amendment rights, plaintiff must allege (1) conduct that is constitutionally protected, and (2) that the conduct was motivating or substantial factor in causing action to be taken by the defendant on which the claim is based. See Mt. Healthy City School Dist. Bd. Of Ed. V. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977).

Here, the Complaint conclusorily asserts that VTL § violates the First Amendment and denies Mr. Stoianoff "his right to free speech and petition." Plaintiff does not identify the constitutionally-protected conduct allegedly abridged by the statute. Moreover, VTL § 502 is not, on its face, a statute affecting or restricting speech or the exercise of the First Amendment rights. Where, as here, the Complaint is devoid of any specific allegations that Commissioner Jackson interfered with plaintiff's freedom of speech or infringed upon his First Amendment right of free expression, plaintiff's claim for violation of the First Amendment must be dismissed. See McFadden v. Solfaro, No. 95 Civ. 1148, 1998 U.S. Dist LEXIS 5765 (S.D.N.Y. Apr. 23, 1998) (First Amendment claim dismissed in absence of any evidence free speech had been curtailed).

B. *Plaintiff's Fourth Amendment Claim is dismissed.*

The Fourth Amendment states, in pertinent part,that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend.IV. Mr. Stoianoff does not allege that he suffered from an unreasonable search or is he seeking to suppress evidence obtained by an unreasonable search. To the extent plaintiff is complaining that disclosure of his SSN violates his right to privacy, the Supreme Court has opined that the "right of privacy" is founded in the Fourteenth Amendment concept

of personal liberty, not the Fourth Amendment. See Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 876 n.23 (1977).[4] Thus, plaintiff's reliance on the Fourth Amendment is misplaced, and this claim is dismissed as well.

C. *Plaintiff Cannot Rely On The Privileges and Immunities Clause Because It Does Not Apply To Citizens Challenging Actions of Their Own States*

Article IV, § 2, cl. 1, of the Constitution provid that the "Citizens of each State shall be entitled to the Privileges and Immunities of Citizens of the several States." The Privileges and Immunities Clause does not provide citizens with new and independent rights, but "establishes a norm of comity" by which citizens of one State coming into the jurisdiction of another are guaranteed equal treatment. The Clause does not permit individuals to pursue actions against their own states. See Zobel v. Williams 457 U.S. 55, 59n.5, 102 S.Ct. 2309 (1982) (Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of state B enjoy"); Bradwell v. State of Illinois, 83 U.S. 130, 138 (1872) ("the protection designed by that clause . . . has no application to a citizen of the State whose laws are complained of"). As a citizen of New York challenging the legislative action of his own state, Mr. Stoianoff has no recourse to the Privileges and Immunities Clause. Plaintiff's claim under the Privileges and Immunities Clause therefore must be dismissed.

D. *Plaintiff's Fourteenth Amendment Claim Is Dismissed*

Plaintiff's Fourth Cause of Action conclusorily alleges

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[4] See infra discussion at Part D.

that it is grounded on plaintiff's right under the Fourteenth Amendment to "procedural due process". Plaintiff also claims that the 1976 amendment to the Social Security Act and VTL § 502 are "impermissibly vague and overbroad" and they fail to provide "constitutional safeguards" for his privacy.

The constitutional right to privacy embodies solely "those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty." Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705 (1973). The activities embraced by this definition relate to the intimate facets of an individual's personal life, including marriage, procreation, contraception, family relationships, child rearing and education. See Paul v. Davis, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166 (1976); Jaffess v. Sec'y., Dept. of Health, Ed. & Welfare 393 F.Supp.[pp. 626 (S.D.N.Y. 1975).

Plaintiff claims constitutional protection from disclosure of his social security number, but his claim is not based on any contention that disclosing the SSN will "restrict his freedom of action in a sphere contended to be private." Paul, 424 U.S. at 713. The mandatory disclosure of an individual's SSN to DMV does not threaten the sanctity of individual privacy so as to require constitutional protection. See McElrath v. Califano, 615 F.2d 434, 441 (7th Cir. 1980) (contention that disclosure of social security number violates right to privacy "has been consistently rejected"); Claugus v. Roosevelt Island Hous. Mgmt Corp., No. 96 Civ. 8155, 1999 U.S. Dist. LEXIS 6162 (S.D.N.Y Apr. 29, 1999) (no constitutionally-protected privacy interest in an individual's SSN).

In any event, any harm from the alleged loss of privacy Mr. Stoianoff may suffer as a result of disclosing his SSN to the DMV would be minimal. DMV regulations provide that

SSNSs will not be made available to the public. See 15 N.Y.C.R.R. § 3.9(c). The license renewal form states that the SSN will only be used "for exchange with other jurisdictions and to invoke driver['s] license sanctions for delinquent child/spouse support payments" and "will not be given to the public or appear on any form or information request." The Social Security Act and the DPPA also prohibit the DMV from disclosing Mr. Stoianoff's social security number without his affirmative consent. See 42 U.S.C. § 405(c)(2)(C)(viii); 18 U.S.C.§§ 2721-2725.

Thus, based on the limited circumstances in which the DMV is permitted to release an individual's SSN, plaintiff's fears that disclosure will lead to the discovery of other private data have very little foundation. Cf. Walls v. City of Petersburg, 895 F.2d 188, 194 (4th Cir. 1990) ("When there are precautions to prevent unwarranted disclosure [of information held by a government agency], and individual's privacy interest is weakened."). Indeed, so stringent are New York's non-disclosure provisions that Mr. Stoianoff need fear disclosure only if he has violated the law. But in his papers opposing the motion to dismiss, he assures this Court that he is neither a criminal nor a dead-beat dad. Thus, Plaintiff should have nothing whatever to worry about. His SSN will never be disclosed to anyone.

In order to allege a violation of his due process rights, Mr. Stoianoff must establish, as a threshold matter, that he suffered a deprivation of a constitutionally-protected liberty or property interest. See Board of Regents v. Roth, 408 U.S. 564, 570-571, 92 S.Ct. 2701 (1972), holding limited by Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976); Gagliardi v. Village of Pawling, 18 F.3d 188, 193 (2d Cir. 1994). It is settled that a driver's license is a property interest protected by the Fourteenth Amendment's due process clause. See Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971).

However, "the deprivation by state action of a constitutionally protected interest in "life, liberty or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such and interest *without due process of law."* Zinerman v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975 (1990) (Emphasis added). States are free to amend vehicle and traffic laws to impose preconditions to license renewals just as they can grant immunity or eliminate welfare of employment programs; without running afoul of the due process clause.

In Martinez v. California, 444 U.S. 277, 100 S.Ct. 553 (1980), the Supreme Court, in upholding a California statute granting official immunity from certain types of tort claims, acknowledged that the grant of immunity did deprive plaintiffs of a property interest, but also determined they were not deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels. See Martinez, 444 U.S. 281-82; U.S. Railroad Retirement Bd. V. Fritz, 449 U.S. 166, 174, 101 S.Ct. 453, 459 (1980); Hisquierdo v. Hisquierdo, 439 U.S. 572, 575, 99 S.Ct. 802 (1979); Flemming v. Nestor, 363 U.S. 603, 609-610,80 S.Ct. 1367, 1371-1372 (1960); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 312, n.8. 315-316, 65 S.Ct 1137, 1141, n.8, 1142-1143 (1945).

Similarly, here, the New York legislature's amendment of VTL § 502 to require disclosure of SSNs provided all the process that was due. See Bi-Metal Investment Co. v. State Board of Equalization, 239 U.S. 441, 445-46, 36 S.Ct. 141, 142-43 (1915). Indeed, in Martinez, the Supreme Court recognized that it "remain[s] true that the State's interest in fashioning its own rules is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary and irrational." Martinez, 444U.S. at 282, 100 S.Ct. at 557;

see also Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-433, 102 S.Ct. 1148 (1982).

There is a rational relationship between the State's interests and VTL § 502. First, VTL § 502 was changed to create stronger enforcement measures in the area of child and spousal support by using SSNs to identify delinquent parties and, where necessary, suspend their driver's license. The statute is rationally related to New York's legitimate interest in locating the whereabouts of errant parents for purpose of carrying out child and spousal support programs.

Second, as evidenced by the detailed and comprehensive provisions which govern driver's licenses, Commissioner Jackson has a strong, legitimate interest in the effective and proper administration of the State's driver's license system. Congress essentially recognized the strength of that interest when, by amendment to the Social Security Act, it authorized states to use SSNS for identification purposes in the administration of driver's license laws. See 42 U.S.C. § 405(c)(2) (C)(i). To promote motor vehicle and public safety, the DMV shares this information with the Secretary of Transportation as part of the National Driver Register.

In amending VTL § 502 to require disclosure of SSNs, the legislature did not carve out any exceptions or authorize Commissioner Jackson to make any exceptions. The fact that Mr. Stoianoff alleges that he now has no children and no child or marital support obligations is irrelevant. Indeed, it would have been irrational for the legislature to authorize the DMV to make individual case-by-case determination of who is capable of fathering a child or being divorced each time a driver's license is renewed in this State. Rational basis analysis does not require that the method of

regulation be narrowly tailored See Martinez, 444 U.S. at 283, 100 S.Ct. at 558. Because VTL § does not violate procedural due process and is rationally related to a legitimate state interest, plaintiff's procedural due process claims are dismissed.

Defendant does not dispute that the driver's license issued by the DMV to Mr. Stoianoff constitutes a property interest protected by the Due Process Clause.(See Def.Br. at 21.) But that does not mean that VTL § 502 deprives him of this property interest without due process of law because, contrary to his contention, due process does not guarantee him a hearing. (See Pl. Br. At 12.) "Due process is flexible and calls for such procedural protections as the particular situation demands."

Gilbert v. Homar, 520 U.S. 924, 930, 117 S.Ct. 1807 (1997) (internal quotations and citations omitted). Here, no evidentiary hearing was required prior to the DMV's denial of plaintiff's license renewal because there was no disputed issues of fact that required examination. "Due process does not require a formal hearing when there are no questions of fact to be determined." Slavsky v. New York City Police Dep't., 967 F.Supp.117, 121 (S.D.N.Y. 1997); see also Gilbert, 520 U.S. at 933 (there is "no need for any process since there would be nothing to consider at the hearing except [an] independently verifiable fact"); Codd v. Velger, 429 U.S. 624, 627-628, 97 S.Ct. 882 (1977) (where plaintiff made only the most limited attempt to dispute the factual issue, he had not raised issue relating to substantial accuracy of finding and Fourteenth Amendment did not require hearing); Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293 (1995) (Breyer, J., dissenting) (Due Process Clause does not entitle an individual to additional hearing unless there is a factual dispute that additional procedure might help resolve).

Plaintiff concedes he did not comply with VTL § 502(6)(a). Specifically, he states that he refused to disclose his SSN to the DMV on the license renewal form. See Cplt. ¶¶ 4,5. VTL § 502 mandates denial of the renewal for failure to disclose the SSN. Denial is automatic under the statute; there is no discretion to the DMV regarding whether to deny renewal. Denial, moreover, is only effective until the readily determinable requirement, i.e., disclosure of the SSN is met. Thus, because there are no factual issues in dispute that require adjudication at a hearing, plaintiff has failed to state a claim for violation of his right to procedural due process of law.

E. *Plaintiff Has Not Asserted a Valid Claim for Violation of the Free Exercise Clause of the U.S. Constitution.*

The Complaint does not include any claim for violation of the right to religious freedom guaranteed by the First Amendment. However, plaintiff refers to a "Memorandum of Law dated October 31, 1997" and challenges VTL § 502 for imposing unconstitutional sanctions "contrary to his religious beliefs." Apparently, Mr. Stoianoff posits that, by authorizing the confiscation of the driver's licenses of absentee parents, most of whom are poor, urban males, the statute deprives them of a means to secure employment and thus constitutes a "scheme for sanctions against the poor," contrary to plaintiff's purported "religious beliefs." Mr. Stoianoff's concern for the poor is commendable, but the extent plaintiff's submissions can be construed to allege a claim for violation of religious freedom, he stands on unsound legal footing.

A rationally-based, neutral state law of general applicability does not violate the right to free exercise of religion, even though the law may incidentally burden a par

ticular religious practice or belief. See Employment Div. v. Smith, 494 U.S. 872, 110 S.Ct. 1595 (1990) (right of free exercise does not relieve obligation to comply with valid, neutral law because law proscribes (or prescribes) conduct that religion prescribes (or proscribes)). In Smith, the Supreme Court held that Oregon could, consistent with the Free Exercise Clause, prohibit sacramental peyote use and thus deny employment benefits to individuals discharged for such use. See Smith, 494 U.S. at 890. The state's capacity to enforce a universally applicable regulation designed to address socially harmful conduct and carry out other aspects of public policy "cannot depend on measuring the effects of a government action on a religious objector's spiritual development." Smith, 494 U.S. at 885.

There is nothing in VTL § 502 to suggest an antagonism by the legislature toward religion in general or a particular religious belief. All applicants for the renewal of a New York State driver's license must provide their SSN. VTL § 502 is facially neutral; it does not have the object of burdening religion; it does not have more than an incidental effect on religious practices or beliefs. Finally, VTL § 502 is rationally related to New York's legitimate interests in locating the whereabouts of errant parents for purposes of carrying out child support programs.

"Given the diversity of beliefs in our pluralistic society and the necessity of providing governments with sufficient operating latitude, some incidental, neutral restraints on the free exercise of religion are inescapable." Bowen v. Roy 476 U.S. 693, 712, 106 S.Ct. 2147 (1986) (Burger, C.J., plurality) (foreshadowing the Smith analysis when rejecting a free exercise challenge to the requirement that applicants for a federal welfare program provide SSNs). As a matter of legislative policy, a state may decide to make religious accommodations to a law of general or neutral application,

but this Court's concern "is not with the wisdom of legislation but its constitutional limitation." Braunfeld v. Brown, 366 U.S. 599, 608, 81 S.Ct. 1144 (1961) (plurality opinion). Thus, under the Supreme Court's holding in Smith, VTL 502, a valid and neutral law applicable to all New York State licensed drivers, does not violate the Free Exercise Clause of the First Amendment. *See* Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir.1999) (claim that California statute requiring DMV to obtain SSN of all applicants for renewal of driver's licenses violated Free Exercise Clause dismissed for failure to state a claim).

IV. The Court Declines to Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claims.

Plaintiff asserts that under principles of "bar and waiver", the legislature is prohibited from amending the VTL to require disclosure of SSN and claims that Commissioner Jackson is liable for tortious conversion because DMV personnel wrote the word "VOID" on plaintiff's check for the license renewal fee before returning it to him.

As set forth above, plaintiff's federal claims against Commissioner Jackson are legally insufficient and fail to state a claim upon which relief can be granted. This Court, therefore, declines to exercise pendent jurisdiction over plaintiff's remaining state law claims. See United Mine Workers of Amer. V. Gibbs, 383 U.S. 715, 716, 86 S.Ct. 1130 (1966); Diamond v. Am-Law Publ'g Corp., 745 F.2d 142, 148 (2d Cir. 1984).

CONCLUSION

This Court continues to adhere to its originally-expressed views about Mr. Stoianoff's complaint —all of it. The pleading fails under well-known and long-settled standards of statutory and

constitutional jurisprudence. Accordingly, it is dismissed in its entirety, with prejudice as to the Federal claims and without prejudice as to the State Claims. Mr. Stoianoff's cross-motion for summary judgment, which this Court deferred pending issuance of the instant opinion, is now moot.

This constitutes the decision and order of the Court.

Dated: August 4, 2000
S/S Colleen McMahon, U.S.D.J.

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 00-9090

Carroll B. Stoianoff, Plaintiff-Appellant v. Commissioner of Motor Vehicles, Defendant-Appellee	* Appeal from the United States District Court for the Southern District of New York [UNPUBLISHED]

Submitted: May 16, 2001
Filed: May 25, 2001

Before FEINBERG, VAN GRAAFEILAND, SOTOMAYOR, Circuit Court Judges

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SUMMARY ORDER

General, on the brief.

Appeal from the United States District Court for the Southern District of New York (McMahon, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, AJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff-appellant Carroll B. Stoianoff ("Stoianoff") appeals the entry of judgment in favor of defendant-appeallee the Commissioner of the Department of Motor Vehicles ("Commissioner") by the district court (McMaHON, *J.*) following its grant of the Commissioner's motion to dismiss pursuant to Fed.R. Civ. P. 12(b)(6). We find no error and therefore affirm for substantially the reasons stated by the district court.

Stoianoff's Freedom of Information Act ("FOIA") claim cannot stand because "it is beyond question that FOIA applies only to federal and not state agencies." *Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999). Assuming, *arguendo*, the existence of a private right of action under the Privacy Act, 5 U.S.C. § 552a, Stoianoff's Privacy Act claim fails nonetheless because the Social Security Act expressly authorizes states to require the disclosure of social security numbers in the administration of driver's license programs, *see* 42 U.S.C. § (c)(2)(C)(i), and provides that any federal law that conflicts with this section is "null, void and of no effect" as of October 1976, *see* 42 U.S.C. § 405 (c) (2) (C) (v).

Stoianoff fails to state a claim that New York's Vehicle and Traffic Law § 502 violated his First Amendment right to free speech because he did not identify any constitutionally protected conduct abridged by § 502 or demonstrate that § 502 is unconstitutional on its face. *See generally Marchi v. Bd. Of Coop. Educ. Serv.*, 173 F.3d 469, 474-80 (2d Cir. 1999). Likewise, Stoianoff's claim that § 502 violates his right under the Free Exercise Clause of the First Amendment fails because § 502 is facially neutral and does not evidence an antagonism by the legislature toward religion in general or particular religious belief. *See Employment Div. v. Smith*, 429 U.S. 872, 877-88 (1990).

Stoianoff's claim under the Privileges and Immunities Clause of Article IV cannot stand because the clause does not permit individuals to pursue actions against their own States. *See Zobel v. Williams*, 457 U.S. 55, 59 n. 5 (1982). Further, Stoianoff's Fourth Amendment claim is meritless because his allegation that disclosure violates his right to privacy must be brought under the Fourteenth Amendment, not the Fourth Amendment. *See Whalen v. Roe*, 429 U.S. 589, 599 (1977).

Finally, Stoianoff's Fourteenth Amendment claims are meritless because he does not allege that disclosure of his social security number would "restrict his freedom of action in a sphere contended to be private,'" *Paul v. Davis*, 424 U.S. 693, 713 (1976); *see also McElrath v. Califano*, 615 F.2d 434, 441 (7th Cir. 1980) ("[T]he contention that disclosure of one's social security account number violates the right to privacy has been consistently rejected . . ."), nor does he allege that there are questions of fact requiring an evidentiary hearing, *see Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam).

Because Stoianoff failed to state a viable federal claim, we affirm the district court's decision to decline to exercise pendent jurisdiction over his remaining state claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-50 (1988).

We have considered Stoianoff's remaining arguments and find them without merit. For the reasons discussed above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By: Ralph A. Anderson, Deputy Clerk
Acting Operations Manager.